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Tetuan K Mano & Assoc (suing as a firm and sole proprietor) v Lim Kien Seng & Ors

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS EX PARTE NO WA-17D-47–11 OF 2016
AZIZAH NAWAWI J
25 OCTOBER 2017

C *Civil Procedure — Limitation — Breach of contract — Limitation period — Whether applicant's claim for fees time-barred under s 6 of the Limitation Act 1953 — Whether application time-barred by s 126 of the Legal Profession Act 1976 — Legal Profession Act 1976 s 126(1) & (3) — Limitation Act 1953 s 6*

D This case was regarding the applicant's originating summons for an order that the bill of costs between the applicant and the respondents be taxed on a solicitor and client basis pursuant to s 126 of the Legal Profession Act 1976 ('the LPA'). The grounds for the applicant's application were that the applicants E legal service was terminated by the respondents and the performa invoices for all the works that had been executed until 2011 were served on the respondents and that the respondents had, through their solicitor, requested for the bills to be taxed. The applicant's firm was retained by Patent View Development Sdn Bhd whereby the appointment was made by the directors of the company, the F first and second respondents. The applicant was also appointed to represent the first and second respondents in their personal capacity as defendants in several suits in 2005. By a letter dated 22 March 2011, the services of the applicant were terminated with immediate effect. Vide a letter dated 2 April 2014, the respondents had disputed the principal and quantum of cost charged and G requested for 'taxation of the said bills pursuant to s 126(3) of the Legal Profession Act 1976'. The first and second respondents objected to the application on the grounds that: (a) the applicant's claim for fees was time-barred under s 6 of the Limitation Act 1953 ('the LA'); and (b) the application was time-barred by s 126 of the LPA.

H **Held**, allowing the application with costs to be paid by the first and second respondents:

(1) The application was not statute-barred under s 6 of the LA. The judge was of the opinion that since the respondents failed to pay the legal bills I as at the date of termination (22 March 2011), it constituted a breach of contract between the applicant and the respondent. Since the application was filed within six years from the date of termination/breach of the contract, the application was not statue-barred as limitation would only set in on 21 March 2017. The cause of action accrued from the breach of

contract, namely the termination of the contract by the respondent without full payment of the professional fees (see paras 20 & 23–24).

(2) The judge was of the opinion that the factual matrix of the case fell within s 126(3) and not s 126(1) of the LPA. Vide the letter dated 2 April 2012, the respondents had requested for the bills to be taxed pursuant to s 126(3) of the LPA. As the respondents had agreed to the taxation of bills under s 126(3), they were estopped from raising an objection to the same by seeking refuge under s 126(1) and submit that the application was time-barred (see paras 28–30).

[Bahasa Malaysia summary

Kes ini adalah berkaitan saman pemula pemohon untuk perintah bahawa bil kos di antara pemohon dan responden-responden untuk dikenakan cukai ke atas dasar peguam dan anak guam berikutan s 126 Akta Profesion Undang-Undang 1976 ('APU'). Alasan-alasan permohonan pemohon adalah bahawa khidmat undang-undang pemohon ditamatkan oleh responden-responden dan invois performa untuk kesemua kerja yang telah dilaksanakan sehingga 2011 diserahkan ke atas responden-responden dan bahawa responden-responden telah, melalui peguam mereka, memohon untuk bil-bil tersebut untuk dikenakan cukai. Patent View Development Sdn Bhd adalah retainer firma pemohon di mana pelantikan dibuat oleh pengarah-pengarah syarikat, responden pertama dan kedua. Pemohon juga dilantik untuk mewakili responden pertama dan kedua dalam kapasiti peribadi mereka sebagai defendan-defendan dalam beberapa tindakan dalam tahun 2005. Melalui surat bertarikh 22 Mac 2011, khidmat pemohon ditamatkan dengan serta merta. Melalui surat bertarikh 2 April 2014, responden-responden mempertikaikan kos utama dan kuantum yang dicaj dan memohon untuk 'taxation of the said bills pursuant to s 126(3) of the Legal Profession Act 1976'. Responden pertama dan kedua membantah kepada permohonan tersebut atas alasan-alasan bahawa: (a) tuntutan pemohon untuk fi adalah dihalang masa di bawah s 6 Akta Had Masa 1953 ('AHM'); dan (b) permohonan tersebut dihalang masa oleh s 126 APU.

Diputuskan, membenarkan permohonan dengan kos dibayar oleh responden pertama dan kedua:

(1) Permohonan bukan dihalang masa di bawah s 6 AHM. Hakim berpendapat bahawa memandangkan responden-responden gagal untuk membayar bil undang-undang pada tarikh penamatan (22 Mac 2011), ia membentuk pelanggaran kontrak di antara pemohon dan responden-responden. Memandangkan permohonan difailkan dalam masa enam tahun daripada tarikh penamatan/pelanggaran kontrak, permohoan bukan dihalang masa memandangkan had masa hanya berkuatkuasa pada 21 Mac 2017. Kausa tindakan terakru daripada pelanggaran kontrak, iaitu penamatan kontrak oleh

responden-responden tanpa bayaran penuh fi profesional (lihat perenggan 20 & 23–24).

(2) Hakim berpendapat bahawa matriks fakta kes terangkum di dalam s 126(3) dan bukan s 126(1) APU. Melalui surat bertarikh 2 April 2012, responden-responden telah memohon untuk bil-bil dikenakan cukai berikutan s 126(3) APU. Memandangkan responden-responden telah bersetuju kepada pencukaian terhadap bil-bil di bawah s 126(3), mereka diestop daripada membangkitkan bantahan kepadanya dengan memohon perlindungan di bawah s 126(1) dan berhujah bahawa permohonan dihalang masa (lihat perenggan 28–30).]

Notes

For cases on breach of contract, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 6408–6410.

Cases referred to

Abbas & Ngan v Affin Bank Bhd [2010] MLJU 1844; [2010] 1 LNS 1082, HC (distd)
Coburn v Colledge [1897] 1 QB 702, CA (refd)
Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565, FC (refd)
Nasri v Mesah [1971] 1 MLJ 32, FC (refd)

Legislation referred to

Legal Profession Act 1976 ss 124(1), 126, 126(3)
Limitation Act 1953 s 6
Solicitors Act 1843 [UK] ss 7, 37

Shailender Bhar (K Manoharan with her) (K Mano & Assoc) for the applicant.
Sandosh Anandan (Culaz & Assoc) for the first and second respondents.
Wong Rhen Yen (Nik & Wong) for the third respondent.

Azizah Nawawi J:

APPLICATION

[1] The applicant's originating summons is for an order that the bill of costs between the applicant and the respondents be taxed on a 'solicitor and client' basis pursuant to s 126 of the Legal Profession Act 1976 ('the LPA 1976').

[2] The grounds of the application are that the applicant's legal service was terminated by the respondents and the performa invoices for all the works that have been executed until 2011 was served on the respondents, and the respondent had, through their solicitors Messrs Culaz & Assoc requested for the bills to be taxed.

[3] Having considered the application and the submission of all parties, this court has allowed the applicant's application with costs. A

THE SALIENT FACTS

[4] The applicant's firm was retained by Patent View Development Sdn Bhd to act for them in legal proceedings initiated against them by various third parties. The said appointment was made by the directors of Patent View, Lim Kian Seng and Lim Kian Peet. The said letter, inter alia, reads: B

> ... We hereby confirm ... that the *Company undertakes and guarantees the payments of your legal fees, disbursement and costs with regards to your firm representing the Company in all legal proceedings* ... C
>
> It was further agreed ... that the Legal Fees and Costs to be paid to your Firm ... *shall be paid by the Company upon the disposal of the aforesaid matters and/or the disposal of the assets of the Company whichever is earlier* ... notwithstanding, the predetermination of the services of your firm by ourselves. D
>
> In the event the Company is unable to pay the said outstanding fees due and owed to your firm, then in such event we as the Directors hereby jointly and severally, and expressly undertake and guarantee the payment of the said Fees to your firm upon discharge and disposal of the matters and/or disposal of the assets of the Company, whichever is the earlier. (Emphasis added.) E

[5] The directors of the company had also appointed the applicant to represent them as their solicitors in their personal capacity as defendants in several suits vide the letter of undertaking issued by the directors in 2005. The said letter of undertaking, inter alia, reads as follows: F

> We ... hereby confirm ... that we *undertake and guarantee the payment of all legal fees and costs due and owed to your firm* ... for representing us in the aforesaid legal proceedings and the said Fees shall be inclusive of all Consultation charges for the said matters but excluding disbursements and out of pocket expenses. G
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> ...
>
> We further undertake and guarantee the payment of the aforesaid fees upon the disposal of *all the aforesaid matters including other matters related to the issues but not specifically set out and/or upon the extraction of the Letters of Administration notwithstanding, the predetermination of the services of your firm by ourselves*. (Emphasis added.) H

[6] By a letter dated 22 March 2011, the respondents terminated the services of the applicant with immediate effect. I

[7] By a letter dated 4 April 2011, the respondents' solicitor Culaz & Assoc, informed the applicant that he has received instructions from the respondents to continue handling the 'matters involving Lim Kien Seng, Lim Kian Peet and

Patent View Development Sdn Bhd'. The said letter, inter alia, reads:

> ...
>
> In order to expedite our representation, we enclose herewith our first Notice of Change of Solicitors for Suit No: D7–26–9–2006.
>
> In the meantime, *we would appreciate if you could let us have a list of pending matters and dates both in the High Court and Court of Appeal to enable us to cross refer with our clients' records*.
>
> As regards *to your balance of fees and costs*, we have been instructed by our clients to *request from you the final account of fees paid to date and the balance payable for their verification*. (Emphasis added.)

[8] In response to the applicant's letter dated 19 October 2011 issuing the summary of bills, the respondents' solicitor replied as follows:

> ...
>
> In connection to this matter, our instructions are to request for a detailed bill on all files and the Invoices related thereto to be forwarded to us to enable us to take our clients instructions in this matter.

[9] In response, vide a letter dated 16 March 2012, the applicant firm issued the performa invoices for their legal fees, costs and expenses incurred for acting as solicitor and counsel for the legal work to the respondents.

[10] In a letter issued by the respondents' solicitor dated 2 April 2014, the respondents dispute both the principle and quantum of cost charged and states that:

> ... Our instructions are therefore to enquire as to whether you consent to the *taxation of the said bills pursuant to* Section 126(3) of the Legal Profession Act 1976, thus negating the necessity to obtain an order of court for that purpose. (Emphasis added.)

[11] When the respondents failed to pay the legal fees, the applicant filed this application pursuant to the LPA 1976 on 21 November 2016.

THE FINDINGS OF THE COURT

[12] The first and second respondents objected to this application on the basis that the applicant's claim for his fees is time-barred under s 6 of the Limitation Act 1953, which provides that an action founded on contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

[13] The first and the second respondents relied on the case of *Abbas & Ngan v Affin Bank Bhd* [2010] MLJU 1844; [2010] 1 LNS 1082, where the High Court dealt with s 124(1) of the LPA 1976 which is pari materia with s 37 of the Solicitors Act 1843 referred to in the case of *Coburn v Colledge* [1897] 1 QB 702. The court then applied the principle in *Coburn v Colledge* and held that the cause of action runs from the completion of the works:

> Isu bilakah kausa tindakan bermula apabila merujuk kepada Seksyen 37 Solicitors Act 1843 telah di ulas dan diputuskan di dalam kes *Coburn v Colledge* [1897] 1 QB 702 yang berbunyi:
>
> > The question is really whether the time within which an action such as this may be brought runs from the completion of the work or from the expiration of one month from the delivery of the bill of costs under s 7 of the Solicitors Act, 1843. If it runs from the completion of the work, the defendant must succeed. If it runs from the expiration of one month from delivery of the bill, the plaintiff must succeed ...
> >
> > It was contended for the defendant *that the cause of action in this case arose as soon as the work was completed. I am of the opinion that this contention is correct* for these reasons ...
> >
> > Section 37 of the Solicitors Act 1843, appears to me to assume that there is a cause of action, and merely to postpone the bringing of an action upon it until the period of one month from the delivery of the bill. There is nothing in the section, so far as I can see, inconsistent with the view that the cause of action arises when the work is completed. It was urged that, if this construction were adopted, a solicitor would have shorter time during which he may abstain from bringing his action for work done that the rest of Her Majesty's subjects. This may be so; but on the other hand, if the plaintiff's contention is correct, the solicitor may abstain from delivering his bill for twenty years, and then at the end of that time he may deliver and sue after the expiration of a month from its delivery. It seems to me would be a very anomalous and inconvenient result ...

[14] Applying the case of *Abbas & Ngan*, the first and second respondents submit that from the applicant's proposed bill of costs, the conclusion date for each case is stated, the last date being 23 October 2010. Therefore, taking the cause of action to run from the last concluded date of 23 October 2010, limitation sets in on 22 October 2016. As this application was filed on 21 November 2016, the first and the second respondents submits that this application is statute-barred under s 6 of the Limitation Act 1953 and must be dismissed.

[15] It is not in dispute that the relationship between the applicant and the respondents are governed by the two letters issued in 2005. The contractual terms in the said two letters is that the applicant will be paid legal fees for the legal work of representing the respondents in the legal proceedings.

[16] Therefore, since the relationship between the applicant and the respondents, that is between a client and his lawyer, is a contractual relationship, the same is subject to s 6 of the Limitation Act 1953.

[17] In the case of *Nasri v Mesah* [1971] 1 MLJ 32, the Federal Court held that for the purposes of limitation, in the case of actions founded on contract, time begins to run from the breach. At p 34/D-F Gill FJ held:

> ... Now, what makes possible an action founded on a contract is its breach. *In other words, a cause of action founded on a contract accrues on the date of its breach.* Similarly, the right to sue on a contract accrues on its breach. In the case of *actions founded on contract, therefore, time runs from the breach*. (Emphasis added.)

[18] The contractual arrangement between the parties is that the applicant was to be paid the legal fees upon the disposal of the legal matter, including other matters related to the issues. Under the term of the appointment letter in 2005, the applicant is to be paid legal fees upon the disposal of the legal matters and/or the disposal of the company assets, whichever is earlier.

[19] There is no clear evidence on the conclusion of the matter or the disposal of the assets of the company. Be that as it may, the service of the applicant was terminated on 22 March 2011. However, as at the date of termination, there are still legal fees not paid. From the documents before this court, the letter dated 4 April 2011 and 18 November 2011 issued by the solicitors of the respondents, the respondents have admitted that some legal fees are still not paid. Vide the letter dated 2 April 2014, the respondents have requested for a taxation of the bills pursuant to s 126(3) of the LPA 1976.

[20] Therefore, I am of the considered opinion that since the respondents have not paid all the legal bills as at the date of the termination, this constitutes a breach of the contract between the applicant and the respondent. As such, the limitation period runs from the date of the breach, that is termination of the contract without full payment of the legal fees. Since this application was filed within six years from the date of the termination/breach of the contract on 22 March 2011, then this application is not statute-barred as limitation only sets in on 21 March 2017.

[21] The facts of this is distinguishable from the case of *Abbas & Ngan* as in that case there is only one bill for professional fees in respect of works that was completed around 24 October 1995. The bill was only issued on 27 November 2004, about nine years after the completion of the works.

[22] In the present case, it is not very clear if all the works were completed because:

(a) the letter dated 4 April 2011 from the solicitors of the respondents to the applicant clearly shows that the solicitors have been appointed to 'continue handling the aforesaid matters';

(b) a request for a list of pending matters and dates of cases in the High Court and the Court of Appeal;

(c) there is also a 'Notis Penukaran Peguamcara' filed in respect of petition D7-26–9 of 2006, which shows that some of the cases have not been concluded; and

(d) that from the letter of Undertaking (2005) the applicant is also to deal with 'matters related to the issues but not specfully set out'.

[23] Added to that, unlike the case of *Abbas & Ngan*, there is the issue of termination of the contract, where the respondents have agreed that payments of some professional bill are still pending. Therefore, in *Abbas & Ngan* where the works have been concluded without the payment of the bills, the cause of action arise from the conclusion of the works. In our case, the works have not been concluded, but the applicant's contract for service was terminated. Thus, the cause of action accrues from the breach of the contract, namely the termination of the contract without full payment of the professional fees.

[24] Therefore, I am of the considered opinion that this application is not statute-barred under s 6 of the Limitation Act 1953.

[25] The next objection is raised by the third respondent, that this application is time-barred by s 126 of the LPA 1976. Section 126(1) states:

> 126 An order for taxation of costs to be made within 6 months of delivery of bill of costs.
>
> (1) An order for the taxation of a bill delivered by any advocate and solicitor may be obtained by a petition as a matter of course by the party chargeable therewith, or by any person liable to pay the cost either to the party chargeable or to the advocate and solicitors, at any time within six months from the delivery of the bill, or, *by the advocate and solicitor after the expiration of one calendar month, and within a year from, the deliver*. (Emphasis added.)

[26] This provision clearly states that an advocate and solicitor may apply for the taxation of the bill after the expiration of one calendar month, and within a year from the delivery of the bill of cost.

[27] In this case, the applicant has delivered the bill to the respondents on 16 March 2012. Thus, the third respondent submits that the one year period ended on 15 March 2013 for the applicant to apply for an order of taxation. Since this application was only filed on 21 November 2016, this application is

time-barred under s 126(1) of the LPA 1976.

[28] However, I am of the considered opinion and I agree with the applicant that the factual matrix of this case falls within s 126(3) and not under s 126(1) of the LPA 1976. Section 126 allows interested parties to apply for an order for the taxation of a bill of cost. This is when the parties cannot agree to the amount in the bills. But s 126(3) provides that where an advocate and solicitor and his client consent to a taxation of a solicitor's bill, the registrar may proceed to tax the bill notwithstanding that there is no order there for.

[29] In this case, vide the letter dated 2 April 2012, the respondents have requested for the 'taxation of the said bills pursuant to s 126(3) of the Legal Profession Act 1976, thus negating the necessity to obtain an order of Court for that purpose'. Since the respondents have agreed to the taxation of the bills under s 126(3), they now cannot object to the same by seeking refuge under s 126(1) and submits that this application is time-barred.

[30] As such, since the third respondent had consented to the taxation of the bills under s 126(3) of the LPA 1976, the third respondent is now estopped from raising an objection under s 126(1) of the LPA 1976. In *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565, the Federal Court held at p 583 with regards to the doctrine of estoppels:

> In the context of litigation, it usually arises where a party to an action has at least two alternative and mutually exclusive courses open to him. If by words or conduct he elects to pursue one of them and thereby leads his opponent to believe that he has abandoned the other, he may, if the circumstances so warrant, be precluded from later changing course.

[31] In the premise, the application is allowed with cost to be paid by the first and the second defendant.

Application allowed with costs to be paid by first and second respondents.

Reported by Fatin Mohd Ismail